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No. 93-1301

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN, and DR. COSETTE Z. VILLANUEVA,
*Petitioners,*

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

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### I. THE SEVENTH CIRCUIT IMPROPERLY INTERPRETED THE WARN ACT.

Increasingly, litigation under the Worker Adjustment Retraining and Notification Act (WARN) has focussed on the scope of the "unforeseeable business circumstance" defense contained in 29 U.S.C. § 2102(6)(2)(A). *Bradley v. Sequoyah Fuels Corp.*, 1994 U.S. Dist. LEXIS 3864 (E.D. Ok. 1994); *International Association of Ma-*

*chinists and Aerospace Workers v. General Dynamics*, 821 F. Supp. 1306 (E.D. Mo. 1993); *Chestnut v. Stone Forest Industries*, 817 F. Supp. 932 (N.D. Fla. 1993); *Electralloy v. United Steelworkers*, 162 Bankr. 121 (Bankr. W.D. Pa. 1993); *Wholesale and Retail Food Distribution v. Santa Fe Terminal Services*, 826 F. Supp. 326 (C.D. Cal. 1993); *Parsley v. Kunja Knitting Mills, Inc.*, 7 IER Cases 225 (D.S.C. 1991).

This case is of overriding importance to WARN because the Seventh Circuit has taken a defense premised on "commercially reasonable business judgment", 20 C.F.R. § 639.9(6)(2), and transformed it into what might best be called the ostrich defense. As long as the Hospital remained sublimely ignorant of all relevant facts pertaining to its principal source of funding, it could claim surprise at the ultimate decision to curtail that funding. That surprise, according to the Seventh Circuit, violated the requirements of WARN.

The ostrich defense threatens the entire future of WARN. This is because, for the totally uninformed employer, everything is a surprise, for the employer who chooses to remain oblivious to the events which might affect his business, no eventuality is even foreseeable.

The trustees of the Hospital could not stick their heads into the ground while $12,000,000 was paid by the Foundation over a four year period, beginning in 1985, and claim surprise when these payments touched the Foundation's corpus which began at $19,000,000 in December 1984. Nor could the trustees of the Hospital stick their collective heads in the ground and claim a total lack of knowledge concerning the terms under which the Foundation could continue to make these subventions.

Contrary to the arguments contained in Respondent's brief, the issue involved in this case has nothing to do with the Hospital's *control* over the Foundation's decision making. Resp. 9.[1] Petitioners assume at present that the

[1] **Petitioners Brief is identified as "Pet. 1." Respondent's Brief is identified as "Resp. 1."**

Hospital's trustees could not influence the decision of the Foundation. This fact, however, makes it all the more imperative from a commercial standpoint that the Hospital's trustees have a complete understanding of the terms under which the Foundation could continue its grants to the Hospital.

The question, therefore, is not whether the Hospital could ultimately *control* the Foundation's decision making process; the critical question unaddressed by the Seventh Circuit is whether the Hospital could ever be said to exercise commercially reasonably judgment by being ignorant of the terms and conditions under which the Foundation could continue its funding of the Hospital.

## II. PETITIONERS DO NOT ASSERT A NEW LEGAL POSITION FOR THE FIRST TIME IN THIS COURT.

Respondent asserts that "Petitioners' . . . contention to this Court that the Foundation was prohibited from making distributions from principal (Pet. 17) conflicts with the position they took in both courts below." Resp. 9, 15. Respondent's argument that this position is now asserted for the first time is simply wrong. In their brief to the Seventh Circuit Petitioners advanced a number of arguments. Among the arguments made in the Court below were the following:

> In the exercise of 'commercially reasonable business judgment,' 20 C.F.R. § 639.9(b)(2), the Hospital knew or should have known well before the October 1989 subvention, that principal would be utilized to support the Hospital.
>
> * * * *
>
> If in fact the Hospital actually believed that the Foundation was precluded from using principal to support the Hospital, reasonable business judgment in predicting the demands of the Hospital would

> dictate that officers of both the Hospital and Foundation should have been aware of this fact at the time the decision was made to transfer the Hospital's investment portfolio to the Foundation. Ordinary business prudence certainly requires strict monitoring of the prospects for continued availability of essential funds, especially in light of the fact that the Foundation was created for the express purpose of supporting the Hospital.

Petitioner's Brief to the Seventh Circuit at 20-21. Not only did Petitioners present the issue of reasonable foreseeability to the Seventh Circuit, that Court was compelled to address this question in its opinion. *Jurcev v. Central Community Hospital*, 7 F.3d 618, 625-627 (7th Cir. 1993). The Respondent's suggestion that Petitioners are raising an issue for the first time in this Court is, therefore erroneous.[2]

## III. THIS CASE PRESENTS A LEGAL ISSUE OF SIGNIFICANCE TO THE PROPER INTERPRETATION OF THE WARN ACT.

Petitioners ask this Court to review a legal question of critical importance—whether the Court below applied the appropriate legal test in analyzing the "unforeseeable business circumstance" defense available under WARN. Contrary to Respondent's assertions, Petitioners are not

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[2] Regardless, even if Respondent's characterization were accurate, this change in "legal position" does not qualify as a legal issue first presented on appeal to this Court warranting denial of certiorari. For example, in *Yee v. City of Escondido*, —— U.S. ——, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), this Court rejected the respondent's contention that the petitioner was making a separate claim by arguing that a rent control ordinance taking of their property occurred by regulation instead of by a physical taking, as had been argued in the court below. This Court stated: "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." 118 L.Ed.2d at 169. That same reasoning would also apply to this case.

asking this Court to "merely reweigh evidence, analyze factual findings, or otherwise 'correct' allegedly erroneous decisions." Resp. 10.

Obviously, as in any litigation under WARN, the particular facts presented are of overwhelming importance. But Petitioners do not challenge the Seventh Circuit's ruling on the ground that it misapplied the facts. Instead, this case is important because the facts which the Seventh Circuit deemed relevant to the unforeseeable circumstances defense provided in 29 U.S.C. § 2102(6)(2)(A) were based on the subjective view of the Hospital's trustees. *See* Pet. 14. It is the Seventh Circuit's focus on the subjective knowledge of the Respondent's trustees that creates a legal issue of such significance to the operation of WARN.

The cases cited in support of Respondent's argument (Resp. 10) stand only for the proposition that evidence and factual findings will not be reviewed by this Court. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n. 8 (1981). Since Petitioners do not seek review of a factual question or evidence, this argument in Respondent's Brief should carry no persuasive weight.[3]

## IV. THERE IS A SPLIT OF AUTHORITY BETWEEN THE CIRCUITS.

This Court's review is also warranted because the Seventh Circuit's failed to apply the principle "that knowledge of officers, directors and other agents is imputed to the corporation if received within the scope of agency and concerns a matter within the scope of the agent's

[3] Respondent's citation to *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), makes no sense. First of all, the case involved the review of a petition for habeas corpus. Second, the case did not involve circumstances in which one party allegedly sought certiorari on a question of law presented for the first time on appeal.

authority." Resp. 10-11. One of the critical questions presented in this case was the time when the Hospital learned that their receipt of funds from the Foundation had actually invaded the principal. Petitioners presented uncontradicted evidence that the Hospital's comptroller was aware of the invasion of principal when it first occurred in October 1989. 7 F.3d at 626. That knowledge, however, was not imputed to the Hospital because, in the Seventh Circuit's view, the comptroller did not understand the significance of this information and did not share it with his superiors.

As noted in Petitioners' original brief, this ruling on the issue of corporate knowledge is directly at odds with the doctrine of cumulative corporate knowledge recognized in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987). Proper application of this doctrine should have led to two conclusions. First, that the Hospital and its Trustees knew that the Foundation's assets had to be monitored closely to avoid invading the principal based upon the fact that at least two of the Hospital's trustees and officers had actual knowledge that the Foundation could not make subventions from the principle. Pet. 17.[4] Second, that the Hospital had knowledge that principal was being invaded as early as October 1979 based upon the testimony of the Hospital's Comptroller. Pet. 19.

The Seventh Circuit's application of traditional agency principles in *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992), is not evidence that the First and Seventh Circuit "fully agree" (Resp. 10) on the law of imputed corporate knowledge.[5]

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[4] Significantly, Respondent does not mention, even once, that the Foundation and the Hospital shared common directors. Resp. 5-6. *See* Pet. 19-21.

[5] In *Juarez* an employee of a company claimed that she had been sexually harassed by a co-worker and filed an action under Title VII. She argued that her complaint to an accounts payable clerk,

*Juarez* involved a case in which the knowledge that the plaintiff, a victim of sexual harassment, sought to impute to the corporation was given to an employee in a circumstance that was not within the scope of that employee's agency, nor did it concern a matter within the scope of the agent's authority. Thus, *Juarez* did not address the question of the proper application of agency principles when it is undisputed that the recipient of the information received that knowledge within the scope of his or her agency, and when that information concerned a matter within his or her authority.

Similarly, Respondent's reference to *United States v. One Parcel of Land*, 965 F.2d 311, 316 (7th Cir. 1992), in which the Seventh Circuit cited to *Bank of New England, supra*, is also not evidence of agreement between the circuits. *One Parcel of Land* involved the interpretation of a federal law (the Controlled Substance Act) whose explicit language, according to the Court, "constrains courts to employ a subjective rather than an objective standard in assessing claimant's knowledge." 965 F.2d at 315. Thus, the language of that statute required the court to apply a standard completely different than that required by WARN, which distinguishes it from this case.

Respondent further suggests that the imputed corporate knowledge issue is actually one of state law. It is immaterial whether, in the abstract, the knowledge a corporation possesses implicates a question of state law. What is important is that, in this particular case, the knowledge which a corporation may be said to possess is of critical importance in applying a federal law. And, in light of the fact that WARN will apply almost universally to corporations and the defense at issue in this case and that

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who had no involvement with the Human Resources Department, which handled sexual harassment complaints, and who had no supervisory authority, should have been imputed to the corporation itself.

application must be based on what that corporation knows or should know, the concept of cumulative corporate knowledge as described in *Bank of New England* takes on extreme importance in the interpretation of this law.

Further, the cases cited by Respondent to support the argument that the doctrine of imputed corporate knowledge is a matter of state law, and thus should not be reviewed, grossly mischaracterizes the issue before this Court (Resp. 11), as well as the well settled principle that the directors of a corporation are chargeable with knewledge of such corporate affairs as it is their duty to keep informed of. *See* Pet. 19-21. *See also Hunt v. Rosenbaum Grain Corp.*, 355 Ill. 504, 189 N.E. 907 (1934); *United Disposal & Recovery Co. v. Industrial Commission*, 291 Ill. 480, 126 N.E. 183 (1920); *A.T. Kearney, Inc. v. INCA International, Inc.*, 132 Ill. App. 3d 655, 477 N.E.2d 1326 (1985); *In re Pubs, Inc. of Champaign*, 618 F.2d 432, 438 (7th Cir. 1980) (citing *Sherwin-Williams Co. v. Watson Industries*, 361 Ill. 598, 198 N.E. 704 (1935).

The doctrine of imputed knowledge should have been applied to determine whether the circumstances causing the hospital closing were reasonably foreseeable. Significantly, Respondent does not cite to any cases in which this Court refuses to review a federal court's failure to properly apply the doctrine of imputed knowledge because it is a matter of state law.[6]

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[6] Instead, Respondent cites to two cases, Resp. 10, which required the federal courts to interpret unrelated state laws. *See Butner v. U.S.*, 440 U.S. 48, 57-58 (1979) (state law, and not a federal rule of equity, can resolve the question of whether a security interest in property extends to rents and profits); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) (proper construction of insurance contracts). Since this case does not, *Butner* and *Ruhlin* are irrelevant. *See also Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977) (interpretation of SEC Rule 10b-5). Because this case does not present a question of corporate law, but

For these reasons, Petitioners respectfully request that this Court grant their petition for certiorari.

Respectfully submitted,

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rather involves an interpretation of a federal law—the WARN Act—reliance on *Burks v. Lasker*, 441 U.S. 471, 477-78 (1979) (federal courts should apply state law governing the authority of independent directors to discontinue derivative suits) is misplaced.